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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

MOTION TO AFFIRM

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McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

STATEMENT

Appellant's *Statement* is substantially correct. However, it should be added that after the decision of Division 3 of the Interstate Commerce Commission denying appellant's application for authority to abandon the line in question (Jurisdictional Statement, Appendix B) appellant filed with the Interstate Commerce Commission a "Petition . . . Seeking a Finding That An Issue of General Transportation Importance is Involved." By its order served July 11, 1963 (Appendix 1 hereof) the Commission held that no issue of general transportation importance was involved in the proceeding, and denied appellant's petition.

ARGUMENT

The decision of the District Court denying appellant's petition to enjoin, annul and set aside the order of the Interstate Commerce Commission, and dismissing appellant's complaint, is plainly correct. In railroad abandonment cases, the Interstate Commerce Commission is governed by the following statutory standard (Interstate Commerce Act, Section 1(18), 49 U.S.C. Section 1(18)):

> "... no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Proper application of the public convenience and necessity standard in Section 1(18) involves a balancing of interests by the Commission. The needs of the local shippers and communities, on the one hand, are compared with the burden (if any) which would be imposed upon interstate commerce by continued operation of the railroad line. This test was set forth almost forty years ago in the case of *Colorado v. United States*, 271 U.S. 153, 168-170 (1926), a decision which the Interstate Commerce Commission has followed ever since and which this Court cited and quoted with approval at the last term. See *Southern Railway Company v. North Carolina*, 376 U.S. 93, 84 S.Ct. 564, 571 (1964).

The Interstate Commerce Commission applied the *Colorado* test to the generally uncontroverted facts of the instant case, and denied authority to abandon. The three-judge District Court affirmed.

The case involves the two major issues which are typical of abandonment proceedings: whether the local shippers and communities need continued rail service of the quantity and quality enjoyed before the line was blocked by the tunnel collapse, and whether a burden on interstate commerce will be created by the repair and continued operation of the line. On the first issue, the hearing examiner and the Interstate Commerce Commission found,

in the words of the District Court, that ". . . there is a continuing need for rail service in the area affected [and] that abandonment would adversely affect the shipping public . . ." Applicant, in its *Question Presented* No. 6, attacks the substantiality of the evidence supporting these findings and contends that the District Court misapplied the test for judicial review of decisions of an administrative agency set forth in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

The question of substantial evidence and application of the *Universal Camera* test in an abandonment case presents no substantial issue calling for briefing and argument before the Court. There are no novel or unique issues involved, nor is there any conflict in the decisions of lower courts. Moreover, the decisions of the hearing examiner and of the Interstate Commerce Commission (Appendices B and C to the Jurisdictional Statement) contain a comprehensive summary of the record demonstrating that the Commission's decision was based upon substantial evidence in the record considered as a whole, and making unnecessary any briefing or argument of the issue of the correctness of the Commission's findings on public need for a restoration of former rail service in the area involved.

The findings of the hearing examiner and Commission are based upon the testimony and exhibits of a number of protesting shipper witnesses, whose testimony was accurately summarized by the examiner* as follows:

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*The Commission adopted the examiner's findings of fact and conclusions of law. Jurisdictional Statement, Appendix B, p. 12a.

"The protesting shippers regard the rail service as having been satisfactory prior to closing of the tunnel, but since that time have experienced reduction from daily to twice-weekly service with accompanying fluctuations in transit time, bunching of deliveries, and other inconveniences. They have suffered complete loss of rail service to and from Schellville and other NWP points north of the tunnel necessitating attempts to use truck transportation which as to certain commodities involves higher costs with less satisfactory handling of the traffic." (Jurisdictional Statement, Appendix C, page 31a).

Against this, appellant contends that the railroad business in the area is declining and that the territory has little or no industrial or carload future. This contention is based on the opinion of an employee of appellant who testified at the hearing. On the other hand, the record contains statistical evidence of the volume of carload freight traffic originated or terminated by appellant in the relevant area for a 10 year period prior to the collapse of the tunnel and also a series of statistical exhibits introduced by protestants indicating increasing commercial and manufacturing activity in Marin County. The Commission resolved the question after consideration of all of this evidence, as indicated in Appendix B to the Jurisdictional Statement, page 16a:

"The segment herein proposed to be abandoned is a portion of the applicant's main line. Shippers located thereon, south of the tunnel, since its collapse have had their daily rail service decreased. Their all-rail route to and from northern and eastern points is cut off, and they are faced with the necessity of utilizing truck transportation which, as to certain

> commodities, involve [sic] higher costs with less satisfactory handling of traffic. Shippers located north of the tunnel, although not opposing the abandonment, will be deprived of rail service to points on the line south of the tunnel and of the more direct and faster route to Richmond. These adverse effects preclude us from finding that no substantial immediate injury will be occasioned to shippers by the abandonment."

Further review of the record by this Court is not indicated, since the examiner's and Commission's decisions set forth the basic facts upon which their ultimate findings were based, together with the evidence upon which appellant would necessarily rely in contending for the opposite result. It is clear from these documents that the findings are supported by substantial evidence, considering the record as a whole, and that the District Court correctly so held.

The Commission also considered the second basic issue—whether the repair and continued operation of the line in question would constitute a burden upon interstate commerce. As the District Court found (Jurisdictional Statement, Appendix A, page 8a) appellant is a wholly owned subsidiary of the Southern Pacific Company. There was, as that Court noted, no evidence that the order denying abandonment would result in a net loss to appellant considered as a separate entity. On the contrary, evidence introduced before the Commission by appellant itself indicated clearly that appellant would *increase* its net profit by over $100,000 per year (appellant's computations, based on 1959-60 traffic levels; see Jurisdictional Statement, Appendix C, page 28a) by

repairing the tunnel. If appellant were considered alone, it is manifest that authority to abandon was properly denied, since the only purpose of Section 1(18) of the Interstate Commerce Act is to protect interstate commerce against burdens arising from financial losses. *Colorado v. United States, supra*, 271 U.S. 153, 163 (1926):

> "The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which is found to result from operating a branch at a large loss."

However, appellant is owned by the Southern Pacific Company, and both the Interstate Commerce Commission and the District Court considered Southern Pacific system revenues as a whole in reaching their decisions. Appellant, by its own computations, demonstrated that the continued blocking of its main line by the collapsed tunnel resulted in increased annual net revenue to the Southern Pacific System considered as a whole (i.e., including both the Southern Pacific Railroad and appellant). Such increase was relatively minor, and was found by the examiner to be $58,265 and $33,722 annually at 1959 and 1960 traffic levels. (Jurisdictional Statement, Appendix C, page 29a). Appellant acknowledged at the hearing that this increase in net system revenue resulted from the diversion of traffic to Southern Pacific from another railroad, The Atchison, Topeka and Santa Fe. The collapsed tunnel blocks off appellant's former connection with the Santa Fe at Tiburon. The Commission

concluded, considering the Southern Pacific system as a whole, that the burden upon the Santa Fe was at least as great as the benefit to the Southern Pacific system, stating its conclusion as follows (Jurisdictional Statement, Appendix B, page 18a):

> "We agree with the hearing examiner's conclusion that the Southern Pacific's anticipated increase in gross revenues as a result of the proposed abandonment would not exceed the sum of the anticipated decrease in applicant's revenues and the loss of estimated revenues by the Santa Fe, as set forth in the recommended report, the net effect being that the three rail carriers as a group would not realize a net gain therefrom and the shipping public would derive fewer benefits."

Appellant attacks the Commission's decision on the ground that appellant's property has been confiscated without due process of law, and that the making of such contention required a review *de novo* by the lower court under the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). This contention forms the second and third of appellant's *Questions Presented*. The lower court held, citing *Southern Railway Co. v. North Carolina*, *supra*, 84 S.Ct. 564, 571 (1964), that the *Ben Avon* doctrine was not applicable in abandonment proceedings. In the passage quoted by the District Court from *Southern Railway*, this Court said:

> "In cases falling within the latter category, such as those involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course

> obvious that the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such services."

The applicable test is public convenience and necessity. Even if the Commission's order in this case would result in "large deficits," rather than a mere reduction in profits, the Commission's finding that public convenience and necessity do not permit of abandonment would satisfy all statutory and constitutional prerequisites to the denial of the application.

There are only two features of the instant case which set it apart in any way from a routine abandonment proceeding. Appellant has called the Court's attention to one of these features, the fact that the collapse of the tunnel has resulted in a *de facto* abandonment and that some $850,000 must be expended for repairs in order to put the line back into operation. However, the annual cost of amortizing this expenditure was included in the figures submitted by appellant to the Commission, and was considered together with all of the other evidence. While this is a large sum, the record shows that a substantial portion of the net income of appellant was derived from traffic moving via the tunnel route, and that portion of appellant's net income cannot be regained unless the tunnel is repaired. In any event, the fact that substantial repairs are required does not alter the duty of the Commission to balance the interests and determine whether the burden of operation, including the cost of such repairs, is such as to overcome the need of local

shippers and communities for a restoration of prior rail service.

The second unusual feature of the case is that, according to applicant's own figures, and giving full weight to the cost of restoring the tunnel, applicant would be financially better off if it restored the tunnel. Thus the only possible justification for abandonment is the modest increase in net profits accruing to the combined Northwestern Pacific-Southern Pacific system if the tunnel remains closed. Such modest increase is at the expense of substantial reduction of service to the shipping public and arises from diversion of traffic from another railroad, the Santa Fe. Here again, however, the applicable standard does not change. The Commission properly exercised its obligation to weigh the pertinent factors bearing upon public convenience and necessity.

A number of minor issues remain. The fourth of the *Questions Presented* implies that appellant's parent corporation has been "excluded from the picture" despite the fact that it has given financial assistance to appellant. Neither the Commission nor the lower court excluded the Southern Pacific Company. On the contrary, as discussed immediately above, the Southern Pacific system was considered as a whole.

The fifth of the *Questions Presented* implies that the Commission based its decision upon a desire to maintain an uneconomic route for a competing railroad. If the Commission's decision maintains a route for the Santa Fe, however, such result is incidental. The Santa Fe was considered only in the sense that the revenues found

to be the cause of increased Southern Pacific profits following abandonment were found to have come from traffic lost by the Santa Fe and gained by the Southern Pacific. Whether the Santa Fe's route was "economic" from the carrier's point of view was not at issue in the case, except insofar as it influenced the Commission's finding (Jurisdictional Statement, Appendix B, page 18a) that "... the net effect [of abandonment] being that the three rail carriers as a group would not realize a net gain therefrom and the shipping public would derive fewer benefits."

Appellant's final contention is that the Commission omitted to apply the doctrine of *Purcell v. United States*, 315 U.S. 381 (1942). On the contrary the Commission (Jurisdictional Statement, Appendix B, page 15a) made specific reference to the *Purcell* case but declined to adopt any specific findings as to cost of freeway relocation because "[w]hile there is some evidence that abandonment might result in a savings to the State when expanding the parallel freeway, no definite plan or schedule for such expansion has been adopted by highway authorities and no specific changes in the highway system in the area are contemplated within the next 5 to 10 years."

A final word should be said about appellant's *Questions Presented*. They are largely rested upon erroneous factual assertions. Thus Question No. 1 asserts that the "railroad business in the area is declining, and in a territory that has little or no industrial or carload future," even though the Commission found to the contrary upon substantial evidence. Question No. 3 asserts a "future lack of potentials in that the railroad business in the area involved in the abandonment has been declining" and "there is little

or no industrial future," even though the Commission found to the contrary upon substantial evidence. Question No. 4 asserts that the Southern Pacific Company has been "excluded from the picture" even though the Commission specifically considered the effect of abandonment upon that company and also gave recognition to the fact that Southern Pacific Company had financed appellant's capital requirements through advances rather than having appellant issue bonds to the public in the sum of some $48,000,000. Question 5 implies that the Commission's order was made for the purpose of benefiting the Santa Fe although the Commission's decision shows that such was only an incidental effect.

CONCLUSION

This is an ordinary abandonment case, whose special features in no way modify the basic standard of public convenience and necessity set forth in Section 1(18) of the Interstate Commerce Act, as illuminated by *Colorado v. United States, supra.* An examination of the decisions below reveals that the Commission properly applied this standard and that the findings upon which the Commission's decision are based find ample support in the record considered as a whole under the rule of *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). Moreover, it was indicated in that case that the Supreme Court would ". . . intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." 340 U.S. at 491.

We respectfully submit that the decision of the District Court is plainly correct, that appellants have presented no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

BORIS H. LAKUSTA
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GRAHAM JAMES & ROLPH
E. MYRON BULL, JR.
Of Counsel

Date: September 11, 1964.

(Appendix 1 Follows)

Appendix I

ORDER

SERVICE DATE
JULY 11, 1963

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of July, A. D. 1963.

Finance Docket No. 21725

Northwestern Pacific Railroad Company Abandonment Between San Rafael and Forbes Overhead (Puerto Suello Tunnel), Marin County, Calif.

Upon consideration of the record in the above-entitled proceeding, including the petition of the Northwestern Pacific Railroad Company, filed June 18, 1963, under the provisions of section 1.101(a) (4) of the General Rules of Practice before the Commission, for a finding that this proceeding involves an issue of general transportation importance; and

It appearing, That no issue of general transportation importance is involved in the proceeding:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)